2214.

SUPREME COURT OF THE UNITED STATES.

No. 126.

CORNELIUS D. THORPE, PLAINTIFF IN ERROR,

vs.

ARDEL B. RAYMOND.

IN ERROR TO THE CIRCUIT COURT, U. S., FOR THE SOUTHERN DISTRICT OF NEW YORK.

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GIDEON, print.

2215

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the judge of the circuit court of the United States, for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Cornelius D. Thorp, plaintiff, and Ardel B. Raymond, defendant, a manifest error hath happened, to the great damage of the said Cornelius D. Thorp, plaintiff, as is said, and as appears by his complaint; we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the law and custom of the United States, ought to be done.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this first Monday of December, in the year of our Lord one thousand eight hundred and fifty-one, and of the independence of the United States the seventy-seventh.

JOHN W. NELSON,

Clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit.

The answer of the judges of the circuit court of the United States, for the southern district of New York, in the second circuit, in the within writ commanded.

The record and proceedings whereof mention is within made, with all things concerning the same, are hereby respectfully sent to the Supreme Court of the United States, within mentioned, in a certain schedule to this writ annexed, as within it is commanded.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this eleventh day of December, [SEAL.] in the year of our Lord one thousand eight hundred and fifty-two.

JOHN W. NELSON, *Clerk.*

By the honorable Samuel R. Betts, one of the judges of the circuit court of the United States, for the southern district of New York, in the second circuit.

To Ardel B. Raymond.

Whereas, Cornelius D. Thorp lately issued out of the Supreme Court of the United States a writ of error, directed to the judges of the circuit court of the United States, for the southern district of New York, stating that, in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judge thereof, between Cornelius D. Thorp, plaintiff, and Ardel B. Raymond, defendant, a manifest error hath happened, to the great damage of the said plaintiff:

And whereas, for the correction of tha terror in due manner, the said writ has been issued, returnable at the next stated Supreme Court of the United States, at the city of Washington, on the first Monday of December next; you are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the tenth day of December, in the year of our Lord one thousand eight hundred and fifty-one, and of the independence of the United States the seventy-seventh.

SAM'L R. BETTS.

CIRCUIT COURT OF THE UNITED STATES,
For the southern district of New York.

CORNELIUS D. THORP
against
ARDEL B. RAYMOND.

STATE OF NEW YORK,
City and county of New York, ss.

I, Hopkins Stewart, of said city, being duly sworn, doth depose and say: That he personally served upon John Slosson, esq., the attorney for the above named defendant, due notice of the substitution [of] C. Nagle, esq., in the place of William H. Bell, esq., as the attorney for said plaintiff; and at the same time, in like manner, served the said Slosson with a copy of the writ of error sued out of the Supreme Court of the United States, in due form in said cause, directed to the circuit judge of the court of the United States, for the southern district of New York, duly signed by the clerk of said court, and at the same time exhibited to him the original; and, in like manner, this deponent says that he served upon said Slosson a copy of a citation made on the tenth day of December inst., and signed by his honor Samuel R. Betts, judge of the circuit court of the United States, for the southern district of New York, and that said service of each and all of said papers was done on

the eleventh day of December inst., at 10 o'clock, a. m., at the office of the said Slosson.

J. HOPKINS STEWART.

Sworn before me, this 11th day of December, 1852.

JOHN W. NELSON,
U. S. commissioner.

Pleas before the judges of the circuit court of the United States, for the southern district of New York, in the second circuit, at the City Hall, in the city of New York, on the third Monday of October, one thousand eight hundred and fifty-one—

Witness, Samuel Nelson, justice; John W. Nelson, clerk.

Be it remembered, that, on the thirty-first day of January, A. D. 1850, before the judges of the said circuit came Cornelius D. Thorpe, plaintiff, by William H. Bell, his attorney, and brought into the said court, before the judges thereof, his certain bill against Ardel A. Raymond; and which said bill is in the following words:

CIRCUIT COURT OF THE UNITED STATES,
For the southern district of New York.

Of Friday, the thirty-first day of January, 1851, as yet of October term, in the year of our Lord one thousand eight hundred and fifty.

WESTCHESTER COUNTY,
Southern district of New York, ss.

Cornelius D. Thorpe, who is a citizen of the State of Ohio, by William H. Bell, his attorney, complains of Ardel A. Raymond, who is a citizen of the State of New York.

For that, whereas the said Cornelius D. Thorpe, on the first day of September, in the year of our Lord one thousand eight hundred and fifty, was possessed of one equal undivided twentieth part of a certain messuage or dwelling-house, called the Homestead, and of certain stores, storehouses, barns, mills, mill seats, water powers, water courses, streams, ponds, and heads of water, on the river or stream called the Bronx or Bronckes river, in the town of Westchester, in the county of Westchester, and State of New York, and within the southern district of said State; and also of eighteen acres of land, situate, lying, and being in the said town of Westchester, adjoining to said messuages, houses, mills, mill seats, and water powers, and situate, lying, and being on both sides of the road or highway leading from the west farms to the town of Westchester, on the east side of said stream or river called the Bronx river; which said lands are bounded on the west by the said Bronx or Bronckes river, on the south by lands now owned by Harris Wilson, esq., on the east by lands now or late in the possession or occupancy of the widow Yates, and on the north by lands now or late in the occupancy of Peter H. Schenck and the Bronx Bleaching Company, with the appurtenances and privileges thereunto belonging and

appertaining; which said homestead, mills, lands, streams, water powers, &c., were formerly known and called successively the Richardson mills, the Byranch mills, and Brower's mills; and which said equal undivided twentieth part of above described premises the said Cornelius D. Thorpe claimed in fee; and the said Cornelius D. Thorpe being so possessed thereof, the said defendant, Ardel A. Raymond, afterwards, to wit, on the second day of September, in the year of our Lord one thousand eight hundred and fifty, entered into the said one equal undivided twentieth part of the said premises, of the value of $25,000, and ejected the said Cornelius D. Thorpe therefrom, and unlawfully and unjustly withholds from the said Cornelius D. Thorpe the possession thereof; to the damage of the said Cornelius D. Thorpe of one hundred thousand dollars, and therefore he brings suit.

W. H. BELL,
Attorney for plaintiff, 52 John street, N. York.

To the within named Ardel A. Raymond, defendant.

You are hereby notified that the declaration, with a copy of which you are now herewith served, and to which copy this notice is subjoined, will be filed on the third day of February next, of the present term of the circuit court of the United States, for the southern district of New York, to be held at the City Hall, in the city and county of New York, in said district.

That upon filing the same a rule will be entered, requiring you to appear and plead to the said declaration within twenty days from the entry of such rule, and that, if you neglect to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in the said declaration.

Dated New York, January 31, 1851.

Yours, &c.,
W. H. BELL,
Attorney for plaintiff, 52 John street, N. Y. city.

UNITED STATES CIRCUIT COURT,
For the southern district of New York.

CORNELIUS D. THORPE
against
ARDEL A. RAYMOND.

CITY AND COUNTY OF NEW YORK, *ss.*

William H. Bell, of said city, attorney for the plaintiff named in the declaration in this cause, being duly sworn, deposes and says, that he has received from the said Cornelius D. Thorpe, the said plaintiff, a written request of him, the said plaintiff, desiring this deponent to commence this suit; and further this deponent saith not.

W. H. BELL.

Subscribed and sworn before me, this 31st January, 1851.
J. W. NELSON, *U. S. com'r.*

And now at this day, that is to say, the twenty-seventh day of February, A. D. 1851, before the judges of said court, at the City Hall in the city of New York, to which day the said defendant had leave to the aforesaid bill to imparle, and then to answer the same, comes the said plaintiff, by his attorney aforesaid.

And the said Ardel A. Raymond, defendant in this suit, by Slosson and Hutchins, his attorneys, comes and says, that he is not guilty of unlawfully withholding the premises claimed by the said Cornelius D. Thorpe, as alleged in the said declaration of the said Cornelius D. Thorpe, and of this he, the said Ardel A. Raymond, puts himself upon the country; and the said defendant doth the like, &c.

Therefore, the issue above joined is ordered by the said court to be tried at the term of such court, to be held at the City Hall, in the city of New York, on the third Monday of October, 1851.

And afterwards, that is to say, the seventeenth day of December, 1851, in the term of October, 1851, before the judges of the said court came the parties aforesaid, by their attorneys aforesaid, and the jurors of the jury summoned to try the said issue being called, likewise come; who to speak the truth of the matters above contained, were chosen, tried, and sworn; and after evidence being given to the said jury, and mature deliberation being thereon had, did find in favor of the said defendant.

Therefore, it is considered that the said plaintiff take nothing by his said bill, but that he be in mercy, &c., and that the said defendant go thereof without day. And it is further considered by the said court now here, that the said defendant recover of the said plaintiff the sum of two hundred and twenty-two dollars and eighteen cents for his costs and charges by him about his defence in this behalf expended, adjudged to the said defendant by the said court now here, with his assent, and that the said defendant have execution therefor, &c.

Judgment signed this second day of July, 1852.

RICHARD E. STILWELL,
Deputy Clerk.

U. S. CIRCUIT COURT.

ARDEL A. RAYMOND ads. CORNELIUS D. THORP. } Judgment record.

SLOSSON & HUTCHINS,
Attorneys.

Filed July 2d, 1852.

United States circuit court, for the southern district of New York, in the second circuit, as yet of the stated term, commencing on the third Monday in October, in the year of our Lord one thousand eight hundred and fifty-one.

SOUTHERN DISTRICT OF NEW YORK, *ss.*

Be it remembered, that on the seventeenth day of November, in the

said stated term of the said circuit court of the United States, before the honorable Samuel R. Betts, district judge of United States, for the southern district of New York, holding the said circuit court, the issue within contained, joined between the parties aforesaid, came on to be tried, and the said parties by their respective attorneys before the said judge also come, and the jurors of the jury on this behalf duly summoned also come, and to say the truth in this behalf are elected, tried, and sworn.

The counsel for the plaintiff, Cornelius D. Thorp, to maintain the issue on his part, then produced and gave in evidence divers letters patent, conveyances, and other documents; and also called and examined several witnesses, who were sworn on his part, and who gave evidence to the court and jury in the said cause; which said evidence, documentary and parol, tendered and conduced to prove, and as the said counsel claimed and insisted, did prove, that the premises described in the plaintiff's declaration, being the mill seat and eighteen acres of land, adjoining the same, on the east side of Bronx river, in the county of Westchester, in the State of New York, or some portion thereof, were in the year 1726 owned in fee simple by Nicholas Brouwer, then of the said county of Westchester, in the then colony of New York, by a complete and valid title derived from the government of the said colony; that the said premises were then in the actual seizin and possession of said Nicholas Brouwer as such owner, and that he continued to be so seized and possessed thereof until his death, which occurred in or about the year 1749; that the said Nicholas Brouwer at the time of his death left no child him surviving, but left as his heir-at-law one grandchild, named Hannah Brouwer, then the wife of Edmund Turner, which said Hannah was the only child of Cornelius Brouwer, son and only child of the said Nicholas Brouwer; that said Cornelius Brouwer died in 1732, in the lifetime of his father Nicholas, leaving one child him surviving, to wit, the said Hannah Brouwer, who, at the death of her father, Cornelius Brouwer, was a minor of about twelve or thirteen years of age; that the said Hannah Brouwer intermarried while a minor, in the lifetime of her said grandfather, and when between seventeen and eighteen years of age, with Edmund Turner, and that she was wife of said Edmund Turner, at the time of the death of her said grandfather, Nicholas Brouwer; that said Edmund Turner lived until about the year eighteen hundred and five, when he died, leaving him surviving his said wife Hannah, formerly Hannah Brouwer; that at the time of his death the said Hannah was, and for five or six years before his death had been, non compos mentis, by reason of a paralytic affection, which had reduced her to a state of mental imbecility, in which state she continued until her death, which took place in the year 1822; that at her death she left as her heirs-at-law, her surviving, several children and several grandchildren, the issue of sons or daughters of said Hannah who had died in the lifetime of said Hannah; that one of her said surviving children was Jemima Thorp, the mother of the plaintiff; which said Jemima Thorp, for-

merly Jemima Turner, was married when nineteen years of age to Peter Thorp, who also died in the year 1822, and that said Jemima Thorp survived her said husband about ten years, and died in 1842, leaving her surviving the plaintiff, Cornelius D. Thorp, who is now fifty-six years of age, and four other sons, one of whom has since died without issue, and one grand daughter the child of a deceased daughter of said Jemima, which daughter had died in the lifetime of said Jemima.

That counsel for the said plaintiff also called and examined witnesses on his part, who gave evidence to the court and jury in said cause, which tended and conduced to prove, and as said counsel claimed and insisted did prove, that the mills and premises in question were occupied immediately before, and at, and for a short time after, the breaking out of the revolutionary war, by one Joshua Pine, who immediately after the close of the revolutionary war removed from Westchester county to Walton, in the county of Delaware, in said State of New York, and there resided until the time of his death, which took place in 1803.

The counsel for the plaintiff also gave evidence on his part, which tended and conduced to prove, and as said counsel claimed and insisted did prove, that the premises, or some portion thereof, described in the plaintiff's declaration, were at the commencement of this suit in the actual possession of the defendant, Ardel B. Raymond, holding the same under, as tenant of Philip M. Lydig, by whom, as his landlord, the action was defended.

And upon this evidence the counsel for said plaintiff rested the case on his part, and hereupon the counsel for the defendant, for the purposes of this trial, admitted that the said several facts, herein before stated to have been claimed and insisted upon by the plaintiff's counsel, as proved by the evidence so as aforesaid given on the part of the plaintiff, were so proved; but the said admission *were* made with the express reservation (assented to by the plaintiff's counsel) that the said admission should not in any future trial in this suit, or in any other suit between the same or other parties, touching said premises, or be used against, or held in any way to affect, the said defendant, or his said landlord, Philip M. Lydig, or any one claiming, or to claim, under Mr. Lydig, his heirs or assigns; and in like manner and subject to the like reservation, it was also admitted by the defendant's counsel that the share of the plaintiff, as one of the descendants of said Nicholas Brouwer in the said premises, was equal to the one undivided thirtieth part thereof, and that if entitled to recover in this action at all, the said plaintiff was entitled to recover the one undivided thirtieth part of the premises in question.

The counsel for the defendant, to maintain the said issue on his part, then called and examined several witnesses on his part, who gave evidence to the court and jury, which tended and conduced to prove, and as was admitted by the plaintiff's counsel did prove, that in and prior to the year 1801, the premises in question were in the actual

possession and occupancy of Oliver De Lancey, who used and occupied and enjoyed the same as the owner thereof; and that in the said year, and by indenture of lease, dated May, 1801, the said Oliver Delancey demised the said premises to James Bathgate, for the term of fourteen years, upon the annual rent of , a copy of which is hereto annexed, marked A; that under said lease the said James Bathgate entered into the possession of the said premises, and continued to occupy and hold the same, as the tenant of said Delancey, until the year 1804, in which year David Lydig entered into possession of the premises, claimed to be owner in fee, and the said Bathgate allowed to him as such owner, and held under him pursuant to said lease, and after its expiration pursuant to a subsequent lease from said Lydig, until about 1840, when the defendant, Ardel B. Raymond, succeeded to him as tenant to Lydig; that by indenture of mortgage, dated May 1, 1805, and recorded in the clerk's office of Westchester county on the 19th May, 1806, said David Lydig mortgaged the premises in question to said Oliver De Lancey, to secure the payment of $6,675, a copy of which mortgage is hereunto annexed, marked C; that David Lydig died in the year 1840, leaving the said Philip Lydig his only child and heir at law; and that from the date of the said lease to Bathgate, viz., May 1st, 1801, to the commencement of this suit, the said premises have been continually held and possessed within actual enclosures by the said Oliver De Lancey, David Lydig, and Philip M. Lydig, and by their several tenants, claiming to be the owners thereof in fee simple and exclusive of any other right, and in all respects occupying and enjoying the same as such owners; and upon this evidence the counsel for the defendant rested the cause on his part; and the said counsel did then and there claim and insist before the said court as matter of law, that notwithstanding the facts proved on the part of the plaintiff, and admitted by said defendant's counsel as herein before contained, the plaintiff had no title or right to recover the possession of any part of the said premises, or to recover any part of the premises in this action, inasmuch as all the title and right of the said plaintiff and of his ancestors, in and to the said premises, had been and was completely barred and extinguished by the adverse possession thereof from May, 1801, of the said Oliver Delancey, David Lydig, and Philip M. Lydig, so as aforesaid proved on the part of the defendant, and the statute of limitations of the State of New York, applicable to actions for the recovery of lands and the possession thereof; and the said counsel prayed the court so to charge and instruct the jury.

But the counsel for the said plaintiff did then and there claim and insist, as matter of law, that the plaintiff, notwithstanding the said adverse possession so as aforesaid proved, was entitled to recover the possession of the one undivided thirtieth part of said premises, or to recover the one undivided thirtieth part thereof, and the said counsel then and there prayed the court so to instruct and charge the jury, upon the grounds and for the reasons following, that is to say:

First. The plaintiff having shown a valid proper title in his an-

cestor, Nicholas Brouwer, and having proved that the said Nicholas Brouwer died seized and possessed of the premises in question, the inheritance therein passed, on his death, to his grand-daughter, and sole heir at law, Hannah Brouwer, the plaintiff's grandmother.

Secondly. The possession of Pine must be deemed to have been taken and held in subordination to, and for the benefit of, the said Hannah Turner, and there being no proof of actual disseisin to bar a descent from her, the inheritance on her death passed to her discendants then living, of whom the plaintiff's mother, Jemima Thorp, was one. On the death of the latter in 1842, the one-fifth of her share passed to the plaintiff as one of her heirs at law.

Thirdly. The plaintiff is not barred by the adverse possession proved in this case, because,

1st. No evidence of title or of color of title in Oliver De Lancey has been given, nor any evidence that his possession was in its inception hostile to the Brouwer title, under which the plaintiff claims. The presumption therefore is, that Delancey entered under that title, and held in subordination thereto, until the lease made by him in 1801 to Bathgate, when for the first, his possession became adverse.

2d. In 1801, Hannah Turner, who was a feme covert at the death of Nicholas Brouwer, yet continued to be a feme covert, and was also insane. The latter of these disabilities continued until her death in 1822, and therefore the statute of limitations did not run against her at all during her lifetime.

3d. Jemima Thorp, under the provision of the New York statute of limitations had ten years after the death of her mother to bring her action, thus prolonging the period allowed for the assertion of her rights to 1832, until which time the statute did not begin to run against her.

4th. The present action possesses, under the revised statutes of the State of New York and the rules of this court, the qualities of both an ejectment and a writ of right; and in the latter respect is entitled to the benefit of the limitation of 25 years, because the right of Jemima Turner accrued before the abolition of that period of limitation by the revised statutes. But whether the action be regarded as an ejectment, subject to the limitation of twenty years, or as a writ of right, the plaintiff in either view of the case is in time, inasmuch as the present action was commenced within twenty years after 1832, when the statute first began to run.

But his honor, the judge, refused to charge and instruct the jury as prayed by the counsel for the said plaintiff, and on the contrary did then and there declare his opinion, and decide, and charged, and instructed the jury:

That, upon the admitted facts of the case, Hannah Turner took title to the premises in question on the decease of her grandfather, Nicholas Brouwer, in 1749, as his heir at law. She was then married, and continued under coverture until 1805.

In 1801 possession was taken of the premises by De Lancoy, whe

claimed the fee in his own right, and the premises have since that time been actually occupied by him, his tenants, and assignees under him, and adversely to all other right and claim of title. At the time De Lancey took possession of the premises, Hannah Turner was non compos mentis, and she continued under that incapacity to her death in 1822. This suit was commenced in 1850. That the first objection upon those facts is, that the present plaintiff, not being heir at law of Nicholas Brouwer, cannot maintain this action, the right of entry of his mother having been tolled or taken away by the disseisin by De Lancey.

And that this point was ruled against the defendant; the jury was instructed that the plaintiff was entitled to recover his share or proportion of this estate of his mother in the premises, if not otherwise barred therefrom.

The court further instructed the jury, that the disability of mental incapacity existing in Hannah Turner at the time of the entry of De Lancey upon the premises, and that disability continuing to her death, the adverse possession did not run against her, notwithstanding the disability of coverture was determined in 1805 by the death of her husband; and that accordingly her heirs had ten years after her decease within which to commence an action.

But the right of entry would be barred if the adverse possession, including those ten years, had then continued twenty years; and the right of title would be barred if the adverse possession had continued twenty-five years including those ten years.

That those ten years having expired in 1832, and the action not having been brought by the plaintiff until 1850, it is barred by the statute of limitations in both aspects, as an ejectment or a writ of right; and that upon the law of the case the defendant was entitled to a verdict.

To which said decision, charge, and instruction, and to each and every part thereof, and to which said refusal of the said judge to charge and instruct the jury as prayed for by the counsel of the plaintiff, the said counsel for the plaintiff did then and there except.

The jury thereupon rendered their verdict for the defendant, with six cents costs.

And inasmuch as the said several matters so produced and given in evidence on the part of the said plaintiff, and by his counsel aforesaid objected and insisted as sufficient to entitle him to a recovery in the action aforesaid, do not appear by the record of the verdict aforesaid, the said counsel for the said plaintiff did then and there propose their aforesaid exceptions to the opinion of the said judge, and requested him to put his seal to this bill of exceptions, containing the said several matters so produced and given in evidence on the part of the said plaintiff as aforesaid, according to the form of the statute in such case made and provided; and thereupon the said district judge, at the request of the said counsel for the plaintiff, did put his seal to this bill of exceptions pursuant to the aforesaid statute in such case made and

provided, on the tenth day of December, in the year of our Lord one thousand eight hundred and fifty-two.

SAM. R. BETTS. [SEAL.]

Bill of exceptions.

CIRCUIT COURT, UNITED STATES,
Southern district, New York.

CORNELIUS D. THORP
vs.
ARDEL B. RAYMOND.

WM. H. BELL, *Attorney.*

Filed December 10, 1852.

UNITED STATES CIRCUIT COURT,
Southern district of New York.

CORNELIUS D. THORP
vs.
ARDEL B. RAYMOND.

On reading and filing consent of Wm. H. Bell, and on motion of Cornelius Nagle, ordered that said Cornelius Nagle be substituted as attorney for the plaintiff in this suit in the place of said Wm. H. Bell.